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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHRISTOPHER M., a Person
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JOSEPH F.,

Defendant and Appellant.

D062399

(Super. Ct. No. J518082)

APPEAL from an order of the Superior Court of San Diego County, Carol

Isackson, Judge. Affirmed.

Joseph F., an alleged father of Christopher M., appeals the juvenile court's order denying him presumed father status and a hearing on his petition for modification pursuant to Welfare and Institutions Code section 388.¹ We affirm.

FACTS

On March 25, 2011, Christopher, then 18 months old, was taken by his maternal great-grandmother to the office of the San Diego County Health and Human Services Agency (Agency). The great-grandmother said Christopher's mother, Patricia M., who was living in Tijuana, had left him in her care 10 days earlier, and the great-grandmother could no longer care for him. The great-grandmother had been trying to contact Patricia for days, but was not successful until the prior evening when they arranged to meet the following morning at the United States/Mexican border. However, Patricia did not show up at the meeting time. The great-grandmother wanted Christopher placed in protective custody because she did not believe Patricia was properly caring for Christopher.

This was not the first time Patricia left Christopher in the care of others for an extended period. Patricia left Christopher with her ex-boyfriend, who in turn transferred him to other acquaintances and eventually the great-grandmother was contacted. From October 7, 2010, to November 24, 2010, the great-grandmother took care of Christopher and was seeking legal guardianship when Patricia contacted her and asked that Christopher be returned to her. (See fn. 2, *post.*) Patricia also had left Christopher's two half siblings with their great-grandmother without any provision for their care. The

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

mother lost custody of Christopher's half siblings; the older child lives with the great-grandmother, who is her legal guardian, and the younger child lives with her father.

In her initial interview with an Agency social worker on March 25, Patricia said she lived with her current boyfriend, Arturo G., but identified Cesar H. as Christopher's father. Patricia said she was not in contact with Cesar and thought he lived in Mexico City. Patricia also denied information previously supplied to the Agency that Christopher's father's first name is Joe or Joseph.² Patricia said she was certain Joseph, a former boyfriend, was not Christopher's father. Later that day, a social worker called Arturo, who said he was Christopher's father.³

On March 28, the social worker asked Patricia to confirm Arturo was Christopher's father, and she replied he was "without a doubt."

On March 30, the Agency filed a dependency petition on behalf of Christopher under section 300, subdivision (b). The petition listed Arturo as an alleged father. The court detained Christopher in foster care, ordered supervised visitation for Patricia and deferred the paternity issue.

Patricia named Arturo as Christopher's biological father in her paternity questionnaire and said there was no question in her mind that he was the father.

² In 2010, the great-grandmother, who had petitioned the court to be named as Christopher's legal guardian, had listed the child's father as "Joe" (no last name) and said he was deceased on the child information attachment to the petition. The great-grandmother did not follow up with the petition because Patricia reclaimed Christopher before the hearing on the petition.

³ Neither Patricia nor Arturo is a party to this appeal.

According to Patricia and Arturo, a home genetic testing kit showed Arturo was the father. Patricia reported Arturo supported Christopher.⁴ Patricia said Arturo could not cross the border because he had been deported.

After the detention hearing, the Agency was unable to contact Patricia for about two weeks and then established contact with her through e-mail. The Agency sought the assistance of Desarrollo Integral de la Familia (DIF), a Mexican social services agency, to contact Arturo, but those efforts were largely unsuccessful. Throughout these proceedings, the Agency did not have any direct contact with Arturo after its initial phone call with him.

On May 19, Patricia's counsel told the juvenile court that Christopher had been living with Patricia and Arturo since his birth except for the time that Patricia spent in San Diego, and Arturo held Christopher out to be his own child. The court elevated Arturo's status to presumed father under Family Code section 7611, subdivisions (a) and (d).

On July 21, the juvenile court sustained the petition and declared Christopher a dependent. The court removed custody from Patricia and Arturo (§ 361, subd. (c)(1)), placed Christopher in foster care,⁵ ordered the Agency to submit a case plan for Patricia

⁴ In her paternity questionnaire, Patricia said she and Arturo were not married, but Arturo's appointed counsel said they were married in 2005. Patricia later said she and Arturo had filled out Mexican marriage paperwork, but she was unsure they were legally married because she could not read Spanish.

⁵ Christopher, a special needs child, has lived in the same foster home throughout this case. The foster parents have indicated they want to adopt him.

and ordered Arturo to contact the social worker within 20 days to get a case plan. Neither Patricia nor Arturo attended the hearing.

For the upcoming six-month review hearing, the Agency recommended services be terminated and a section 366.26 hearing be set. Patricia had visited Christopher only sporadically, and the Agency had no verification that she had started services. When DIF contacted Arturo, he said he was not interested in participating in any services.

On December 29, Patricia arrived for a visit with Christopher accompanied by two adults who claimed they were Patricia's cousins from Georgia. Patricia told the social worker she wanted Christopher placed with her in the home of her cousins.

On February 8, 2012, the juvenile court terminated services and set a section 366.26 hearing. It found returning Christopher to his parents would be detrimental to his physical and emotional well-being, reasonable reunification services had been offered and the parents had not made progress with their case plans.

In May 2012, Joseph contacted the Agency and said he was "stepping forward as Christopher's father." He also said Patricia told him that he was Christopher's father and gave him "the okay, otherwise I wouldn't be calling you. She wants to have a family with me. I do love him [Christopher]. I love her too" In a subsequent phone conversation, Joseph said he recently moved from Virginia and was staying in a townhouse in Mexico.

At a special hearing on June 6, the juvenile court ordered a paternity test for Joseph. In a paternity questionnaire, Joseph said Patricia had told him he was Christopher's father and he had told his extended family he was Christopher's father.

Joseph also said he had visits with Christopher of up to one month in length from the child's birth until February 2011, had supported Christopher on visits and had helped Patricia with expenses. Joseph also testified that he had been a Virginia resident for 15 years and had traveled to Mexico about one and one-half weeks before the hearing to find Patricia, who he had not seen or been able to contact since February 2011. Before then, Joseph said he had regularly traveled from Virginia to take Christopher every other month to visit his allegedly paternal relatives in Hesperia, California. Joseph learned that Christopher was in the dependency system about 10 days earlier when Patricia told him.

On June 11, 2012, Patricia told the social worker that she had lied "about everything." Patricia also said she knew "for a fact" that Joseph was Christopher's father. After a June 18 visit with Christopher, Patricia told the social worker she doubted her son would be returned to her care, but if Christopher were returned to Joseph, "I'll get him back. I'm going to do what I need to do." Patricia said Joseph had cared for Christopher "every other week"; the social worker noted Joseph previously had said he saw Christopher every other month or every couple of months.

On June 26, the paternity test results showed Joseph was not the biological father of Christopher.

On July 26, Joseph filed a section 388 petition to vacate the court's May 19, 2011, order finding Arturo was the presumed father of Christopher and to grant him (Joseph) presumed father status. As new information, the petition cited Joseph's recent court appearance with new information about paternity and his interest in services, visits and custody while Arturo had never contacted the Agency, participated in services or

requested visits. Regarding how the requested change would benefit Christopher, the petition stated that it "would give Christopher the opportunity to maintain ties with family."

At a special hearing on July 31, the juvenile court found a prima facie showing had not been made as to either changed circumstances or best interests and denied an evidentiary hearing on the petition. The court stated:

"The Court does not find there is a prima facie established here, either as to changed circumstances or best interest. As to changed circumstances, [Joseph] appeared. That is something that changed, but I don't think it is sufficient to support the Court finding by a preponderance of the evidence that there is a changed circumstance. We have to look at the context in which [Joseph] did appear. He appeared on the eve of a [section 366].26 hearing. [¶] . . . [¶]

"He indicated that he had been living in Virginia for 15 years. He indicated that he, during the early part of Christopher's life, cared for him every other month. . . . [H]e did not provide as part of the [section] 388 [petition] any proof whatsoever that he commuted from Virginia, that he took the child for a month at a time. It was simply his word, which the Court did not find credible particularly in the context to the mother stating to . . . the social worker that she's lied about everything and that if Christopher is back with [Joseph], though, I will get him

"The Court cannot disregard the Court's knowledge of the context in which this [section] 388 [petition] is filed.

"And in addition, the [section] 388 [petition] makes reference to the new information provided by [Joseph]. So it's incumbent upon the Court to take a look at the new information. I don't find either source of the information, mother or [Joseph], credible. It would have been much more credible and perhaps met the threshold requirement of a [section] 388 [petition] had [Joseph] provided some proof of his prior involvement with the child.

"In addition, he had no address. He just moved to Mexico [10] days ago, commuted from Mexico to get the child. It was a bit jumbled, but in any case, not credible.

"So I do not find [he has] met the threshold as to [section] 388 for coming forward with enough information to consider that he may be or is presumed [father] under [Family Code section] 7611[, subd.] (d). Therefore his status remains alleged father"

DISCUSSION

Joseph contends the juvenile court erred by denying him an evidentiary hearing on his section 388 petition because he made the requisite *prima facie* showing of changed circumstances and best interests. The contention is without merit.

"Section 388 provides the 'escape mechanism' . . . built into the [dependency] process to allow the court to consider new information." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Pursuant to section 388, a parent or a person having an interest in a dependent child may, "upon grounds of change of circumstance or new evidence," petition the juvenile court to change, modify, or set aside any court order. (§ 388, subd. (a)(1).) The petition must allege why the requested change is "in the best interest[s] of the dependent child." (§ 388, subd. (b).) "If it appears that the best interests of the child . . . may be promoted by the proposed change of order, . . . the court shall order that a hearing be held" (§ 388, subd. (d).)

The court, however, may deny a section 388 petition without a hearing when the petition fails to make a "prima facie showing of a change of circumstances and that the proposed change of order is in the best interest[s] of the child." (*In re D.R.* (2007) 155 Cal.App.4th 480, 487; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; Cal. Rules of Court, rule 5.570(d).) When determining whether the petition makes the necessary

showing, the juvenile court must liberally construe it in favor of its sufficiency. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) " 'The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.' [Citations.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Not just any change of circumstances will entitle a petitioner to a hearing under section 388. Rather, "the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order." (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) To warrant a hearing, "[t]he petition may not be conclusory. 'Specific allegations describing the evidence constituting the proffered changed circumstances or new evidence' is required. [Citation.] Successful petitions have included declarations or other attachments which demonstrate the showing the petitioner will make at a hearing of the change in circumstances or new evidence." (*In re Anthony W., supra*, 87 Cal.App.4th at p. 250; see also *In re Edward H.* (1996) 43 Cal.App.4th 584, 593 ["If a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted."].)

We apply the abuse of discretion standard in our review of the juvenile court's decision to deny the section 388 petition without a hearing. (*In re Brittany K., supra*, 127 Cal.App.4th at p. 1505.) We affirm the order unless it " 'exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*Ibid.*) The

juvenile court's decision will not be disturbed " ' "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination." ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "The denial of a section 388 motion rarely merits reversal as an abuse of discretion." (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

The juvenile court was well within its discretion in denying Joseph's section 388 petition without a full evidentiary hearing. The petition did not establish a change in circumstances or other new evidence that would suggest a modification of the court's prior order would promote Christopher's best interests. Joseph was an alleged father, whose biological claim was shown to be not true. Even by his own claim, he was coming forward after having not seen Christopher for nearly one and one-half years. Further, Joseph did not supply any documentary evidence to support his claim that he had traveled from Virginia to San Diego or Mexico every other month to visit Christopher and take the boy to his allegedly paternal relatives in Hesperia. The petitioner bears "the responsibility in the first instance, as [the] moving party, to make a prima facie showing, which [Joseph] failed to do." (*In re Anthony W., supra*, 87 Cal.App.4th at p. 251.) Also, Joseph's claim of visits every other month was belied by the great-grandmother's undisputed account that Christopher was in her care through most of October and November 2010—the first time Patricia had abandoned her son.

Moreover, the juvenile court is not obligated to accept a petitioner's allegation in a vacuum sealed off from facts revealed earlier in the proceedings. Rather, the court may consider the "historical patterns" of the case in evaluating the petition and its prima facie

sufficiency. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.) As to Joseph's appellate argument that because of the credibility issue, an evidentiary hearing was called for, we disagree. As cited in our factual recitation, the juvenile court, in denying an evidentiary hearing, expressed doubt about the credibility of Joseph and Patricia, who supported his paternity assertion. There was ample cause for such doubt because after Joseph appeared in the case, Patricia told a social worker that although she did not expect Christopher to be returned to her, "if Christopher is with [Joseph], I'll get him back. I'm going to do what I need to do." Joseph also told a social worker he called the Agency only because Patricia approved of him doing so.

Joseph's reliance on *In re Clifton V.* (2001) 93 Cal.App.4th 1400 is misplaced. There, the mother filed a section 388 petition requesting that her son be returned to her care due to the changed circumstance that she was visiting and calling him more frequently. (*Id.* at p. 1403.) The paternal grandmother submitted a declaration stating the mother was not telling the truth about the frequency of the calls and visits. (*Id.* at pp. 1403-1404.) The Court of Appeal held the juvenile court violated the mother's right to due process by denying her request for a full evidentiary hearing and that the error was not harmless beyond a reasonable doubt because the matter involved "a clear credibility contest between [the] mother and the paternal grandmother" (*id.* at p. 1405), and "the juvenile court was at a great disadvantage in evaluating the parties' credibility". . . "[w]ithout the benefit of live testimony and cross-examination" (*Id.* at p. 1406.)

Here, in contrast, the issues relating to Joseph's paternity claims did not involve a "clear credibility contest." The juvenile court had already had the opportunity to make

the credibility determinations it needed to decide whether to grant Joseph presumed father status at an earlier hearing, when he responded under oath to the court's questions. Because Joseph did not present any new essential facts in connection with the section 388 petition that would have required further credibility determinations, there was no need for further live testimony.

We also conclude that the evidence fails to establish that Christopher's best interests would be served by the requested relief. The following factors should be considered in determining whether a section 388 petition addresses the best interests of the child: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) The strength of the relative bonds between the child and parent and caretakers becomes an even more important factor when a section 388 petition is filed after reunification services have been terminated. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.]" (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

Joseph alleged in his section 388 petition that the proposed change "would give Christopher the opportunity to maintain ties with family." Aside from the fact that any

reunification between Joseph and Christopher was highly speculative, the allegation completely ignored Christopher's interest in stability. The evidence before the juvenile court was that Christopher, a special needs child, was thriving in the care of the foster parents who were willing to provide a permanent plan of adoption for him. "At this point in the proceedings, on the eve of the selection and implementation hearing, the [child's] interest in stability was the court's foremost concern, outweighing any interest [father] may have in reunification." (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252.)

As Joseph did not carry his burden under section 388 to make a prima facie showing of new evidence or a change of circumstance or that the change would be in the best interests of Christopher, the juvenile court did not abuse its discretion in summarily denying the petition for modification.

DISPOSITION

The order is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.